4-H PARTNERSHIP

IBLA 98-468 Decided June 11, 1999

Appeal from a decision of the White River (Colorado) Resource Area Manager, Bureau of Land Management, raising rental on right-of-way COC33707, for a natural gas processing site.

Affirmed.

1. Mineral Leasing Act: Generally--Rights-of-Way: Appraisals

An appraisal of fair market value for a natural gas processing plant right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

APPEARANCES: Don Judd, Midland, Texas, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE TERRY

On August 31, 1998, the Area Manager, White River Resource Area, Bureau of Land Management (BLM), Meeker, Colorado, issued a decision increasing the annual rental for a right-of-way (ROW), BLM Serial No. COC33707, from $1,646 to $3,485 to be paid annually beginning January 1, 1999. 4-H Partnership (4-H or Appellant) filed a timely appeal from that decision to this Board. 1/

1/ Both the Notice of Appeal and the Statement of Reasons (SOR) are filed on letterhead for Davis Gas Processing, Inc., and signed by Don K. Judd, as "agent." Departmental regulation 43 C.F.R. § 1.3 defines categories of individuals who may represent parties in practice before the Department. "Agents" are not among the categories listed. The Board has held that an appeal brought by a person who does not fall within any of the categories of persons authorized by 43 C.F.R. § 1.3 to practice before the Department is subject to dismissal. Thomas L. Tuttle, 71 IBLA 265 (1983), and cases cited therein. This raises the question of whether Judd is qualified to practice before the Department. No explanation is furnished for the term

The official BLM record reveals that on September 13, 1983, in accordance with section 28 of the Mineral Leasing Act of February 25, 1920, 30 U.S.C. § 185 (1988), BLM entered into COC33707, a 30-year renewable ROW grant, with Cerrito Land Company for a gas processing plant site 660 feet by 1,220 feet, situated in secs. 5 and 8, T. 2 S., R. 96 W., Sixth Principal Meridian. The grant indicated that rental would be set at fair market value. (ROW Grant at Sec. 2.t.)

An initial real estate appraisal was completed by Richard Goossens, District Appraiser, on June 16, 1983, and was established by BLM decision dated August 16, 1983, at $1,025 per year. That rate was based upon an assessment that the highest and best use of the land at that time was for "livestock grazing with an interim but compatible use for energy production." (Goossens Report at 5.) Three sales of operating ranches proximate in time and location were considered in arriving at a fair market value for the ROW. The appraiser arrived at a range of value, based upon the two sales most similar in value to 4-H's tract, of between $422 and $470 per acre. The per-acre value of the tract was therefore listed at $450. The $1,025 annual rental was calculated using the formula 450 (dollars) x 18.48 (acres) x 0.95 (percentage of rights conveyed) x 13 (administratively set rate of return) = $1,027.03, rounded down to $1,025.

Subsequently, Cerrito liquidated and distributed its assets, assigning its interest in the gas processing plant ROW to certain shareholders, who then assigned their interests to 4-H. This assignment was approved March 27, 1986. On June 4, 1988, BLM amended the ROW grant to reflect that the actual site used was 660 feet by 1,320 feet, and corrected the legal description to lot 25, sec. 5, and lots 2, 3, and 4 of sec. 8, T. 2. S., R. 96 W., Sixth Principal Meridian.

In June 1988, BLM revisited the question of rental for the ROW. 2/ In this "short form" appraisal, 3/ the appraiser compared the property

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fn. 1 (continued)
"agent," in the pleadings, nor is the relationship of Judd to 4-H clear from the record; however, we will not attempt to clarify that situation. Nor will we dismiss the appeal. We will address the merits because in any event the action taken by BLM was proper. See Donald E. Hook, 76 IBLA 367, 368 (1983).

2/ Sec. 2.t. of the ROW grant provides:

"The Bureau of Land Management, after the initial determination of fair market value for the right-of-way, reserves the right to review the fair market value determination whenever necessary and to adjust it in accordance with regulations and procedures in effect at the time of review, if necessary, to insure the payment to the United States of full fair market value of the right-of-way."

3/ Short form appraisals are of a limited, or summary, nature, and are used by BLM, at its discretion, in "simple, non-controversial" cases.

to other properties being used for oil and gas-related activities in northwestern Colorado, and determined that, when compared to those properties (as opposed to livestock properties), fair market value for the ROW was considerably more than had previously been assessed. Using a range of between $2,500 and $3,339 per acre based upon rental values assessed for comparable properties, the second appraisal arrived at a sale value of $2,750 per acre, for a total value of $55,000 ($2,750 x 20 (acres)). The appraiser then determined the annual rent by using the formula $55,000 x 0.95 (rights conveyed) x 0.10 (rate of return), for a total annual rent of $5,225 for the 20 acres.

Subsequent to that rental increase, 4-H applied for a reduction in acreage of the ROW. On October 4, 1988, the grant was amended from 20 to 6.3 acres (5.05 acres for the plant, and 1.25 acres for a driveway and living quarters), and the corresponding annual rental was reduced to $1,646. On July 21, 1998, BLM approved a second partial relinquishment of the ROW (containing acreage previously used for housing and out-buildings), further reducing the acreage to 6.06. Also on July 21, 1998, the BLM District Manager requested a third appraisal for the remaining 660- by 400-foot nonlinear site.

The third appraisal, conducted by BLM Appraiser Cara W. Curtis, resulted in an appraisal report issued in August 1998. This appraisal included a review of property data on file, an update of market survey data of prices paid for similar uses of similar property, and an analysis of that data. (Curtis Appraisal at 5.) In her appraisal, Curtis used the market comparison approach to value, which was based on comparable rentals for like properties sold for similar uses. Unlike the second appraiser, she did not base her comparison on sales of property nor did she discount the conveyance of lesser than fee rights or uses and amortization, as she reasoned that the "grantor has full use of the entire payment of present value for the partial interest conveyed," and "no adjustment for payment terms is required." (Curtis Appraisal at 11.) Her analysis consisted of across-the-board comparison of right-of-way rentals across Colorado, New Mexico, and Wyoming.

The Curtis Appraisal contains the following salient analysis:

> The going market rate for rural industrial site leases varies considerably depending on site use, individual landowner knowledge and experience, and alternative routes or sites available to the lessee. The prices paid for similar rights of use for both sites and linear interests are based on negotiation and do not necessarily reflect land values. Damages for crop losses, tree losses, etc. are often paid separately and in addition to the "going rate". Rangeland values in the area of the subject site range from $200 to $400 per acre depending on size and location. Comparison shows that a typical 50-foot R/W at $15/rod

> equates to $792 per acre and a two acre drill site at $8,000 equates to $4,000 per acre. Neither reflect rangeland value.
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> Survey [i.e., comparison] sites were restricted to similar rural sites with similar locations, accessibility, and character. Survey site prices do not vary consistently with these factors and therefore, no adjustments are warranted. Site location is governed by oil and gas field proximity or transmission line routes. Access is typically constructed by lessees. All are rural native rangeland sites similar to the subject.
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> Survey site prices have increased over time. Many leases have escalator clauses and are often increased based on the U.S. Dept. Of Labor Consumer Price Index. Older leases, with escalator clauses, would appropriately be adjusted upward for time.
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> The data indicates that small sites generally lease on a site basis rather than a per acre basis. * * * Rental of larger sites appear to be based more on a per acre per year rate.

(Curtis Appraisal at 11-12.) Of the more than 40 rural industrial sites included in her updated 1996 market survey (contained in the Addenda to the Report), Curtis chose larger sites sold on a per-acre per-year basis and governed by leases containing escalator clauses as most reflective of comparable market conditions. Curtis found that, of the four survey sites most closely matching Appellant's site, the lowest rental was $400 per acre per year, while the highest was $575 per acre per year (which was a 1989 rental rate). The sites rented at $400 per acre per year contained 10 acres (Item Wy-2 in the Addenda), 167 acres (Item Wy-3, Addenda), and 37 acres (Item CO-13, Addenda).

Curtis concluded that the sites that rented for $400 per acre per year were larger sites than Appellant's, suggesting to her that a $400 per acre rental for Appellant's 6.06 acre site would be lower than fair market value. The 15-acre site rented at the higher rate (Item Wy-6, Addenda), $534, was due to be increased in 1999. She concluded that these two factors placed 4-H at the high end of the range for per-acre per-year rental assessments; she therefore assessed it at $575 per acre per year, for a total of $3,485 per year. Her analysis concludes: "The estimated market rental represents a substantial increase over prior use authorizations on this site indicating that the lessee may have previously enjoyed below market rates for the authorized use." (Curtis Appraisal at 12.)

In its SOR, 4-H has provided a copy of the Consumer Price Index (CPI), U.S. City Average, for 1966 through 1997, published by the U.S. Department of Labor, Bureau of Labor Statistics, as well as the CPI Southwest

Statistical Summary, covering the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, for July 1998. 4-H argues:

> The annual rental fee [for our Piceance Creek gas plant] was increased from $1,606 to $3,406, a 112% increase. We are appealing this increase because:
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> 1. The rate increase far exceeds the compounded CPI between July 1988 and July 1998. The compounded CPI index is 37.73 versus the 112% fee increase set by the BLM.
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> 2. The tract of land is unsuitable for any practical real estate application other than a process plant. A plant location is not random and competitive, i.e., any odd tract of land may not be applicable, hence comparison to commercial land values is not valid.
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> 3. If the plant does not operate, the 6.06 acre tract has little practical value.

Departmental regulations governing rentals for Mineral Leasing Act rights-of-way provide at 43 C.F.R. § 2883.1-2: "Holders of right-of-way grants and temporary use permits issued under this part shall make rental payments in accordance with § 2803.1-2 of this title, except that the provisions of § 2803.1-2(b) of this title shall not apply." The cited regulation, 43 C.F.R. § 2803.1-2, is the regulation governing rentals for rights-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761-1771 (1994).

Rental for nonlinear right-of-way grants and temporary use permits is addressed in 43 C.F.R. § 2803.1-2(a), which states, in pertinent part: "The holder of a right-of-way grant * * * shall pay annually, in advance, except as provided in paragraph (b) of this section, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as is practicable and feasible, using comparable commercial practices." 4/ BLM correctly employs the comparative value method of appraisal, where, as here, there is adequate data for determining the fair market value of a nonlinear ROW. See Western Field Production, Inc., 116 IBLA 225, 227-28 (1990), and cases cited.

4/ As provided in 43 C.F.R. § 2883.1-2, the provision of 43 C.F.R. § 2803.1-2(b) allowing for waiver or reduction of rental is inapplicable to Mineral Leasing Act rights-of-way.

[1] As a rule, BLM's fair market value determination will be affirmed if the Appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. Regina B. Perry, 142 IBLA 278, 281 (1998), and cases there cited. The Board has applied this standard of review regardless of whether the right-of-way is linear or nonlinear, or whether it is authorized pursuant to FLPMA or the Mineral Leasing Act of 1920. See Western Field Production, Inc., supra at 228; Western Slope Gas Co., 61 IBLA 57 (1981).

Appellant here argues that the rental increase is excessive based upon the fact that the percentage increase since the previous appraisal increased approximately three-fold over the increase of the CPI. Taking Appellant's argument in its most favorable light, however, we cannot reach the conclusion that this allegation proves that there was error in BLM's appraisal method or that the fair market determination is erroneous.

The increase shown by the CPI over the 10-year period since the last appraisal is only one of the factors contributing to the rental adjustment. If that were the only factor considered by BLM's appraisal team, one could expect that the 1998 adjustment would roughly equate the percentage increase in the CPI. However, additional factors are present, not the least of which is that BLM has better and quicker access to pertinent market information in 1998 than it did when this lease was first appraised. Appraisal methods now account for the specific market in oil and gas ROW rentals, which has created a different use category with different participants. This class of users has created its own market conditions, which place different pressures on all ROW grantees because they are now competing with each other instead of with primarily agricultural grantees. The existence of this narrower class of grantees has also eliminated the need to compare ROW sales with ROW rentals, thus eliminating adjustments of market prices downward for conveyance of lesser uses and lower rates of return. Moreover, while Appellant's reduction in ROW acreage worked to its advantage in acquiring some relief from the 1988 appraisal, the lower acreage has now worked against Appellant. This is because, within the class of ROW's that are evaluated for rental on a per-acre per-year basis, ROW's with higher acreage generally achieve a cost savings per acre over ROW's with lower acreage. 4-H's rental has stayed low as these other factors in the marketplace have operated to generally increase rates of rental. Thus, Curtis' assessment in the appraisal that, "[t]he estimated market rental represents a substantial increase over prior use authorizations on this site indicating that the lessee may have previously enjoyed below market rates for the authorized use," is accurate.

Turning to Appellant's other two arguments--that this tract of land is unsuited for any practical application other than that of gas processing, and that if the plant is not operated, the tract has little commercial value--we do not find that these arguments establish error in the

appraisal by a preponderance of the evidence. While both statements contain their element of truth, the appraisal that resulted in Appellant's rental increase is based on a comparison using the "highest and best use" of the land as its basis. It is undisputed that use as a gas processing facility will bring a higher price than grazing use. The question determined in this case was: "Using the pool of non-linear oil and gas ROW grants as the basis for comparison, what is the fair market value of the rental for this particular ROW?" Appellant has not shown us that Curtis' conclusions on this point are erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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James P. Terry
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge